

Vanessa R. Waldref
United States Attorney
Jeremy J. Kelley
Frieda K. Zimmerman
Assistant United States Attorney
United States Attorney's Office
Eastern District of Washington
Post Office Box 1494
Spokane, WA 99210-1494
Telephone: 509-835-6356

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES

Plaintiff,

v.

ANDREI S. BORGHERIU,

Defendant.

CASE NO. 4:22-cr-6040-SAB-1

UNITED STATES' RESPONSE TO
MOTION TO DISMISS (ECF No.
114)

February 10, 2025 at 9:30 a.m.
Richland, WA- With Oral Argument

The United States of America, by and through Vanessa R. Waldref, United States Attorney for the Eastern District of Washington, Frieda K. Zimmerman and Jeremy J. Kelley, Assistant United States Attorneys, respectfully submits this response to Defendant's Motion to Dismiss (ECF No. 114). Defendant moves for dismissal of Counts One and Two of the Indictment, contending that the Indictment fails to allege deprivation of a traditional property interest. ECF No 114 at 3.¹ This

¹ When citing to ECF No. 114, the United States has used the ECF pagination at the top of the page.

1 motion should be denied for several reasons. First, it is untimely. Second, the
2 Indictment alleges that the object of Defendant’s scheme was to obtain money—a
3 traditional property interest—from the SBA by means of materially false and
4 fraudulent pretenses, representations, and promises. ECF No. 1 at 2.

5 **I. Background**

6 The Indictment charges that Defendant lied to the SBA to obtain nearly half a
7 million dollars in economic injury disaster loan (EIDL) proceeds when he falsely
8 and fraudulently certified to the SBA, on his Loan Authorization and Agreement for
9 the EIDL, that he would only use the EIDL proceeds solely as “working capital to
10 alleviate economic injury.” ECF No. 1 at 5. Based on the false representations made
11 by Defendant, the SBA approved distribution of \$499,900.00 in EIDL funding. ECF
12 No. 1 at 4. However, after the SBA disbursed the proceeds to Defendant, he used
13 almost all the money to instead buy a personal residence. ECF No. 1 at 4. At trial,
14 the United States will prove beyond a reasonable doubt that Defendant knew he was
15 lying to get money that he was not entitled to when he falsely certified, under penalty
16 of perjury, that he would use the EIDL proceeds solely “as working capital to
17 alleviate economic injury.”

18 **II. Discussion**

19 Fed.R.Crim.P. 12(b)(3)(B)(v) permits a defendant to move to dismiss an
20 indictment on the grounds that the indictment fails to state an offense. Under the
21 rule, courts may entertain motions that require them to answer only pure questions
22 of law. *See, e.g., United States v. Shortt Acct. Corp.*, 785 F.2d 1448, 1452 (9th Cir.
23 1986); *United States v. Covington*, 395 U.S. 57, 60 (1969); *United States v. Nukida*,
24 8 F.3d 665, 669 (9th Cir.1993) (motion to dismiss is generally “capable of
25 determination” before trial “if it involves questions of law rather than fact.”).

26 Additionally, when ruling on a pretrial motion to dismiss, “the district court
27 is bound by the four corners of the indictment.” *United States v. Lyle*, 742 F.3d 434,
28 436 (9th Cir. 2014); *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002). A

1 court “must accept the truth of the allegations in the indictment in analyzing whether
2 a cognizable offense has been charged.” *Boren*, 278 F.3d at 914. A “motion to
3 dismiss the indictment cannot be used as a device for a summary trial of the
4 evidence” and courts “should not consider evidence not appearing on the face of the
5 indictment.” *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996) (internal
6 quotations omitted). Courts ask only whether a crime has been alleged. *United States*
7 *v. Milovanovic*, 678 F.3d 713, 717 (9th Cir. 2012).

8 An indictment is “sufficient if: (1) it contains the elements of the offense
9 charged and fairly informs the defendant of the charge against which he must defend;
10 and (2) it enables him to plead an acquittal or conviction in bar of future prosecutions
11 for the same offense.” *United States v. Hill*, 279 F.3d 731, 741 (9th Cir. 2002) (citing
12 *Hamling v. United States*, 418 U.S. 87 (1974)); *see also*, *Russell v. United States*,
13 369 U.S. 749, 763-764 (1962); Fed. R. Crim. P. 7(c). An indictment is generally
14 sufficient if it sets forth the offense in the words of the statute itself as long as “those
15 words of themselves fully, directly, and expressly, without any uncertainty or
16 ambiguity, set forth all of the elements necessary to constitute the offenses intended
17 to be punished.” *Hamling*, 418 U.S. at 117; *see also* *United States v. Awad*, 551 F.3d
18 930, 935 (9th Cir. 2009) (“The test of sufficiency of the indictment is not whether it
19 could have been framed in a more satisfactory manner, but whether it conforms to
20 minimal constitutional standards.”) (internal citations and quotation marks omitted).

21 Here, Defendant moves to dismiss the Indictment under Rule 12, on the basis
22 that it fails to state an offense.² ECF No. 114 at 5. Defendant’s motion should be
23 denied. First, it is untimely. Second, the Indictment alleges that the object of
24

25 ² While Defendant’s motion is titled a “Motion to Dismiss Indictment,” Defense does
26 not allege deficiencies in Count 3, charging Defendant with violation of 18 U.S.C. §
27 287. Thus, even if there was a basis to dismiss Counts 1 and 2, which there is not,
28 Count 3 would still proceed to trial, as scheduled.

1 Defendant's scheme was to obtain money—a traditional property interest—from the
2 SBA by means of materially false and fraudulent pretenses, representations, and
3 promises.

4 **A. Defendant's Motion is Untimely.**

5 Local Criminal Rule 12(c)(1) provides that absent good cause, “all defenses,
6 objections, or requests pursuant to Fed. R. Crim. P. 12, which are capable of
7 determination without the trial of the general issue, must be raised by pretrial motion
8 and noticed for hearing on or before the deadline set by the assigned judge for
9 hearing all pretrial motions.” In this case, the last scheduling order allowing for
10 pretrial motions was ECF No. 52, with a deadline for all pretrial motions of
11 November 17, 2023. ECF No. 52 at 16. Several subsequent scheduling orders
12 indicated that the deadline for pretrial motions had passed. *See*, ECF No. 68 at 15,
13 ECF No. 80 at 16. The most recent scheduling order, ECF No. 109, provides
14 deadlines for trial materials, but not pretrial motions. ECF No. 109 at 2.

15 The United States recognizes that this case has been rescheduled multiple
16 times, and that on occasion case developments in continued cases may necessitate
17 motions outside of the initial schedule. However, this motion is based on the
18 allegations in the Indictment, which the Defense has had since September of 2022.
19 *See*, ECF No. 10. Because this particular motion is based on nothing more than legal
20 argument about the sufficiency of the Indictment, it could have been filed within the
21 deadlines set by the Court, and as such the current filing is untimely.³ However, for
22 reasons discussed below, this motion fails on the merits as well.

23
24
25 ³ To the extent Defendant may contend that the Ninth Circuit's decision in *U.S. v.*
26 *Millheiser*, 98 F. 4th 935 (9th Cir. 2024), upon which he relies, is an intervening
27 reason for the untimely filing of this motion, that decision was issued on April 9,
28 2024.

1 **B. The Indictment Alleges a Scheme to Obtain Money, a Traditional**
2 **Property Interest.**

3 To establish a violation of 18 U.S.C. §1343, the United States must prove: (1)
4 Defendant knowingly devised a scheme or plan to defraud for purposes of obtaining
5 money or property by means of false or fraudulent pretenses, representations, or
6 promises; (2) the statements made as part of the scheme were material; (3) Defendant
7 acted with the intent to defraud, that is, the intent to deceive and cheat; and (4)
8 Defendant used, or caused to be used, an interstate wire communication to carry out
9 or attempt to carry out an essential part of the scheme. *United States v. Miller*, 953
10 F.3d 1095, 1101-03 (9th Cir. 2020); *see also* 9th Cir. Pattern Jury Instruction 15.35.

11 Here, while acknowledging that the Indictment tracks the language of 18
12 U.S.C. §1343, ECF No. 114 at 5, the Defense argues that the Indictment fails to
13 allege that Defendant intended to deprive the SBA of a traditional property interest,
14 and that the interest asserted is actually “the right to control the use of the funds after
15 it disbursed them.” ECF No. 114 at 11. However, neither the language of the
16 Indictment nor the relevant caselaw support this argument. In the text of the
17 Indictment, the United States alleges that Defendant devised a “scheme to defraud
18 the SBA, and to obtain money and property from the SBA by means of materially
19 false and fraudulent pretenses, representations, and promises.” ECF No. 1 at 3. It
20 further specifies that as part of the scheme, Defendant sought to fraudulently obtain
21 money from the EIDL program, and was successful in obtaining \$500,000.00. ECF
22 No. 1 at 4. Money is a “tangible, traditional property interest.” *USA v. Miller*, 2023
23 WL 7346276, at *5 (N.D. Cal. Nov. 6, 2023). As such, the Indictment states a
24 scheme to defraud in order to obtain money, which falls squarely in the required
25 elements for violation of 18 U.S.C. §1343.

26 However, Defendant contends that the interest asserted by the United States
27 is actually “the right to control the use of the funds after it disbursed them.” ECF
28 No. 114 at 11. In addition to reading language into the Indictment that is not present,

1 Defendant attempts to support this argument through various cases which are not
2 analogous, as they involve schemes which do not allege a scheme for deprivation of
3 money from the victim. *See United States v. Ciminelli*, 598 U.S. 306 (2023)
4 (concluding that economic information is not a property interest for purposes of wire
5 fraud); *Cleveland v. United States*, 531 U.S. 12 (2000) (concluding that state poker
6 licenses are not a property interest for purposes of mail fraud); *McNally v. United*
7 *States*, 483 U.S. 350 (1987) (concluding that state official agreeing with insurance
8 company to continue relationship in exchange for sharing of commissions with
9 specific insurance agencies, including one he controlled, did not violate mail fraud
10 statute as scheme that did not result in monetary loss but defrauded the citizens and
11 government of Kentucky of their right to have the Commonwealth's affairs
12 conducted honestly was not "property"). As these cases relate to property rights
13 outside of the "traditional property rights," like money, none of these cases support
14 Defendant's argument.

15 In fact, the argument that wire fraud convictions cannot be sustained in the
16 context of EIDL funding because any harm that could have been suffered by the
17 SBA is not to a "traditional property interest" has been raised and rejected by several
18 district courts. *See United States v. Mansouri*, 2023 WL 8430239, at *3 (W.D.N.Y.
19 Dec. 5, 2023) (denying the defendant's motion to dismiss indictment alleging that
20 the defendant submitted multiple applications for loans under the Paycheck
21 Protection Program and Economic Injury Disaster Loan program that included
22 "materially false and fraudulent information, pretenses, representations, and
23 promises," because "unlike the *Ciminelli* indictment, the indictment [in *Mansouri*]
24 sa[id] nothing about depriving the lenders or the SBA of their 'right to control'
25 property" and instead alleged a scheme "whose object was money itself"); *United*
26 *States v. Smith*, 2024 WL 4545904, at *4 (W.D.N.Y. Aug. 29, 2024), *report and*
27 *recommendation adopted*, 2024 WL 4545170 (W.D.N.Y. Oct. 22, 2024) (denying
28 defendant's motion contending indictment charging wire fraud violations for PPP

1 and EIDL fraud should be dismissed due to failure to allege required specific intent
2 to harm property, as indictment sufficiently alleged that the object of
3 defendant's fraud was money and property belonging to the financial lenders and the
4 SBA, which he sought to obtain or obtained through false pretenses and
5 misrepresentations); *United States v. Sheppard*, 2024 WL 2815278, at *15 (S.D. Fla.
6 June 3, 2024) (rejecting defendant's argument that his wire fraud convictions cannot
7 be sustained based on a harm to the SBA because any harm that could have been
8 suffered by the SBA was not to a "traditional property interest," and concluding that
9 the money defendant obtained through EIDL loan fraud fell firmly within the wire
10 fraud statute). This motion should be similarly denied, as in the context of EIDL
11 funding, "money (obtained from loan proceeds) is not only a traditional property
12 interest, it is squarely covered by 13 U.S.C. § 1343's text which covers 'obtaining
13 money or property.'" *United States v. Sheppard*, 2024 WL 2815278, at *17 (S.D.
14 Fla. June 3, 2024) (emphasis in original).

15 Similarly, the Defense argument that attempts to graft the predominantly civil
16 concept of "fraud in the inducement" onto a scheme to obtain money, "the archetypal
17 subject of federal fraud prosecutions," *United States v. Jesenik*, 2023 WL 3455638,
18 at *2 (D. Or. May 15, 2023), falls flat. Here, although the Defense characterizes
19 cases as "fraud in the inducement" and argues that the theory allows for absurd
20 results, this is merely another angle to discuss schemes where the alleged object of
21 the fraud is not a traditional property interest, albeit this time in the context of a
22 commercial exchange. *See, United States v. Bruchhausen*, 977 F.2d 464 (9th Cir.
23 1992) (where indictment did not allege financial loss, manufacturer had no property
24 right under wire fraud statute for loss in control over the destination of their products
25 after sale); *United States v. Milheiser*, 98 F.4th 935, 942 (9th Cir. 2024) (where
26 company sold toner to businesses falsely indicating they were their normal toner
27 supplier, court "rejected the notion that depriving an individual of accurate
28 information alone constitutes fraud" because loss of the "right to make an informed

1 business decision” does not constitute loss of “something of value”). *Bruchhausen*
2 and *Milheiser*, as well as the Defense hypothetical regarding Steph’s babysitting
3 services, involve two parties to a commercial transaction, each seeking something
4 of value. However, given that the Indictment⁴ alleges that Defendant devised a
5 scheme to defraud for purposes of obtaining money, these cases are inapplicable
6 here.

7 The Defense contends that “the SBA received exactly what they bargained
8 for,” ECF No. 114 at 13, but it is inaccurate and misleading to frame Defendant’s
9 application to receive a significant amount of federal funding through a government
10 assistance program designed to provide low interest rate loans to disaster victims as
11 a situation where the SBA’s intention they were “bargaining” for was simply
12 “assurances of repayment of a loan with interest.” ECF No. 114 at 13. The SBA is
13 not a private entity selling a loan product to make money on interest. To the contrary,
14 disaster loans provided by the SBA are subsidized by the federal government,
15 intended to provide “low interest, fixed rate loans to disaster victims.” 13 C.F.R. §
16 123.2. The interest rate on EIDL loans is capped at four percent, and the
17 Administration does not charge borrowers points, closing, or servicing fees on any
18 disaster loans authorized under Section 7(b). *Id.* at §§ 123.302, 123.8. Further, to the
19 extent that Defendant is arguing that misrepresentations about the intended use of
20 the funds were not a “material misrepresentation,” ECF No. 114 at 13, that is a mixed

21 _____
22 ⁴ It is worth noting that in *Milheiser*, the court considered whether the evidence
23 presented at trial was sufficient to establish defendants intended to injure a monetary
24 or other traditional property interest. *Milheiser*, 98 F.4th at 942. In *Bruchhausen*, the
25 defendant argued after a bench trial that the indictment was insufficient as a matter
26 of law, as the indictment did not include any allegation of financial loss.
27 *Bruchhausen*, 977 F.2d at 467. The procedural posture here, on a pre-trial motion is
28 different and requires the Court accept the facts in the Indictment as pled.

1 question of fact and law that is not appropriate for disposition under Rule 12. *See*
2 *generally, United States v. Serv. Deli Inc.*, 151 F.3d 938, 941 (9th Cir. 1998) (citing
3 *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976) (“[W]hether a false
4 statement is material to an agency decision is a mixed question of fact and law
5 typically resolved by juries.”). Here, Defendant did not negotiate and enter into a
6 contract to perform some service for the United States. He asked the government for
7 \$500,000 with the representation that he would use the funds to alleviate the
8 economic injury to his business caused by the pandemic, and the ancillary interest
9 rate on that money does not somehow convert the money into some type of non-
10 traditional property interest or the loan agreement into some type of contract for
11 services akin to the cases cited by the Defense.

12 Further, Defendant’s attempt to frame the EIDL as a civil contract that cannot
13 result in criminal liability if the loan is paid back, ECF No. 114 at 4, 13, is not
14 supported by the law. *See, e.g., United States v. Miller*, 953 F.3d 1095, 1103 (9th
15 Cir. 2020)(“Intent to repay... is not a defense to wire fraud.”); *United States v.*
16 *Harris*, 2022 WL 17741034, at *4–5 (E.D. Ky. Dec. 13, 2022) (concluding that in
17 the context of a scheme to deprive the SBA of EIDL funding, a defendant's intention
18 to repay loan money is irrelevant for purposes of proving wire fraud given that the
19 government does not need to show that the victim was *actually* deprived of money).

20 **III. Conclusion**

21 Defendant made false representations in order to receive federal funding
22 during a time of national crisis. Specifically, Defendant received \$499,900.00 in
23 U.S. currency—*i.e.*, “money,” a traditional property interest—based upon false and
24 fraudulent representations, pretenses, and promises that the funds would be used

25 //

26 //

27 //

28 //

1 solely as working capital for Defendant's business. The resulting charged crimes are
2 sufficiently stated in the Indictment. Defendant's motion to dismiss should be
3 denied.

4 Dated this 22nd day of January, 2025.

5
6 Respectfully submitted,

7 VANESSA WALDREF
8 United States Attorney

9 /s/ Frieda K. Zimmerman

10 Frieda K. Zimmerman

11 Jeremy J. Kelley

12 Assistant United States Attorney
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to noticed counsel.

/s/ Frieda K. Zimmerman

Frieda K. Zimmerman

Jeremy J. Kelley

Assistant United States Attorney